

From: Halprin, Lawrence P.
Sent: Friday, May 10, 2013 3:13 PM
To: Horowitz, Mike@DIR
Cc: Halprin, Lawrence P.
Subject: Globally Harmonized System (GHS) update to Section 5194
Importance: High

Dear Mike:

Thank you for considering our comments on the pending draft proposal to amend the Cal-OSHA Hazard Communication Standard ("HCS"). This firm represents a broad range of employers impacted by the proposed rule. In addition, we have extensive experience with implementation and interpretation of the existing HCS standards in the United States and around the world, including preparing MSDS and labels, and the development and implementation of the GHS, HCS 2012, HCS 1994 and Prop 65. Accordingly, we believe we are in a position to offer an important perspective on this matter.

Impact of the Product Rule:

Given the length of time since Federal-OSHA approved the incorporation of Prop 65 into the California State Plan, we thought it would be appropriate to provide you with the June 6, 1997 Federal Register notice that formally describes that approval, the rationale for that approval and the conditions under which that approval was granted. At that time, under both the California and Federal rules, the NTP and IARC determinations were deemed conclusive as to chemical classification, and the one-study rule was in effect. That is no longer the case. Furthermore, the Prop 65 warning could be provided through point of sale or point of use signage, which avoided the potential for conflicting MSDS or labeling requirements. That would not be the case under the interim California GHS rule or the draft proposed California GHS rule.

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=13641

Testing of Chemicals:

Another important issue raised by the California GHS rule involves the testing of chemicals to determine their chemical composition and hazards. HCS Section 1910.1200(b)(2) states that the rule applies to chemicals "known to be present in the workplace." No testing is required to identify unknown chemicals. That interpretation was explicitly stated by Federal OSHA in a December 1, 1998 Letter of Interpretation from OSHA to Mr. J. J. Wherry Grinding Wheel Institute (copy attached), which can be found at

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22657

That letter states, in pertinent part:

“[Q:] What tests or exposure scenarios are required to establish a standard of proof for the article exemption?

[A:] The HCS does not require testing to determine the presence of a hazardous chemical. The rule covers chemicals which are ‘known to be present’.”

Section 1910.1200(d)(2) states, in pertinent part:

“There is no requirement to test the chemical to determine how to classify its hazards.”

In other words, Section 1910.1200(b)(2) makes clear that there is no requirement under HCS 2012 (or HCS 1994) to perform any testing to determine the composition of the chemical. Furthermore, Section 1910.1200(d)(2) makes it clear that there is no requirement under HCS 2012 (or HCS 1994) to perform any testing to determine whether the chemical presents any of the health hazards described in Appendix A of HCS 2012 or any of the physical hazards described in Appendix B of HCS 2012.

We are not suggesting that such testing may not be required by other OSHA standards or tort law, but it is not required by the HCS. To the extent that California would attempt to impose such an obligation under its version of the HCS, it would need to clarify the scope of that requirement and justify that requirement. To the best of our knowledge, no one has estimated the potentially huge costs that could be imposed on industry depending on how such a requirement was interpreted.

Thank you for your consideration.

Sincerely, Larry

Lawrence P. Halprin, Partner
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
tel: 202.434.4177 | fax: 202.434.4646 | halprin@khlaw.com

Keller and Heckman LLP
Serving Business through Law and Science®

Washington, D.C. | Brussels | San Francisco | Shanghai

Visit our websites at www.khlaw.com or www.packaginglaw.com for additional information on Keller and Heckman.

Please consider the environment before printing this email.

This message and any attachments may be confidential and/or subject to the attorney/client privilege, IRS Circular 230 Disclosure or otherwise protected from disclosure. If you are not a designated addressee (or an authorized agent), you have received this e-mail in error, and any further use by you, including review, dissemination, distribution, copying, or disclosure, is strictly prohibited. If you are not a designated addressee (or an authorized agent), we request that you immediately notify us of this error by reply e-mail and then delete it from your system.